(8)

No. 95-1595

# In the Supreme Court of the United States

OCTOBER TERM, 1996

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

*v.*

MARVIN K. YOUPEE, SR., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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1. In *Hodel* v. *Irving*, 481 U.S. 704 (1987), this Court applied the tripartite analysis of *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), to determine whether the original version of Section 207 of the Indian Land Consolidation Act, 25 U.S.C. 2206 (1982), was a regulatory action that went "too far," and therefore violated the Just Compensation Clause of the Fifth Amendment. In our opening brief, we therefore applied the same analysis in arguing that the amended version of the same Act is constitutional under the Just Compensation Clause. Respondents nonetheless argue (Br. 11-14) that the *Penn Central* analysis is inapposite because, in their

view, what is at issue here is not a "regulatory taking." Respondents argue instead that the Court should strike down Section 207 as a permanent, physical invasion of private property rights.

Respondents' approach is obviously inconsistent with this Court's decision in *Hodel* v. *Irving*. The Court there applied the *Penn Central* analysis because that is "[t]he framework for examining the question whether a regulation of property amounts to a taking requiring just compensation." 481 U.S. at 713. The unamended Section 207 was a regulation of property, because it is the decedent's rights that are at issue in a case such as this, see 481 U.S. at 711-712, and because Section 207 did not grant the United States (or the Tribe to which the property may escheat) any authority physically to invade or otherwise control the use or enjoyment of the property interests at issue while they were in the decedent's hands. Rather, Section 207 merely eliminated the decedent's ability to dispose of his or her property in one particular manner (by devise or descent), which comes into play only at one particular time (at the time of death). All other rights to dispose of the property before or at death, and all rights to use and enjoy the property during the decedent's lifetime, remained entirely unaffected by Section 207. Therefore, the unamended Section 207 was just the sort of regulatory measure that has long been examined through the lens of the tripartite *Penn Central* framework.[1] The amended Section 207 has still less of

[1] See, *e.g.*, *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 485 (1987); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1004-1005 (1984); *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981); *Agins* v. *Tiburon*, 447 U.S. 255, 260-261 (1980); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 174-175 (1979).



an effect on the decedent's property, because it does not entirely eliminate devise, but merely limits the class of eligible devisees. The *Penn Central* analysis therefore should be applied in this case as well.

That conclusion also follows from this Court's decision in *Andrus* v. *Allard*, 444 U.S. 51 (1979). In that case, the Court employed the *Penn Central* regulatory-taking analysis to determine the constitutionality of a statute that forbade owners of certain eagles or eagle parts from selling them. 444 U.S. at 65-68. That statute therefore had a greater effect on the right of alienation (and a greater effect on the economic value of the property) than does Section 207, which leaves the owner of minor fractional interests in property with a variety of means to sell or otherwise dispose of that property both before and at death. See Gov't Br. 27-31. If the *Penn Central* analysis was appropriate in *Allard*, it follows *a fortiori* that it applies here.

Finally, neither of the authorities on which respondents rely to urge a different analysis is apposite. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), involved a statute that prohibited all construction on certain beachfront property and thereby "rendered valueless" the property involved. *Id.* at 1020. The Court found "categorical treatment"—rather than the *Penn Central* analysis—appropriate based on a line of cases supporting such treatment "where regulation denies all economically beneficial or productive use of land." *Id.* at 1015. In this case, by contrast, Section 207 has little impact on the uses to which the decedent's minor fractional interests could

be put, on the market value of those interests, or on the ways in which the decedent could use or enjoy whatever rights those interests gave him in the property at issue. Accordingly, the "categorical approach" of *Lucas* has no application here.

*United States* v. *Causby*, 328 U.S. 256 (1941), establishes the same point. If that 1941 case had indeed dictated that Section 207 be considered under the analytical framework for physical—not regulatory—takings, the Court's decision 36 years later in *Hodel* v. *Irving*, which analyzed the original version of Section 207 under the regulatory taking framework, would be inexplicable. *Causby* provided no guidance in *Hodel* v. *Irving*—and provides no guidance for this case—because it involved a direct physical invasion of the airspace above a private person's property by low-flying government planes landing at an adjacent airport. See 328 U.S. at 265. *Causby* did not involve an effort to regulate the uses of the property (or the airspace above it) or the ways in which the owner could dispose of property at death or before. The court's determination that a physical taking resulted in *Causby* therefore does not suggest that a physical taking is at issue in this case.

2. Applying the *Penn Central* analysis, we explain in our opening brief (Gov't Br. 24-25) that the economic impact of the amended version of Section 207 is less than the economic impact of the original version, and that that fact supports the constitutionality of Section 207 as it now stands. Respondents do not dispute that conclusion.[2] We also note (Gov't Br. 26) that

[2] Amici Allottees Association and Affiliated Tribes and Bands of the Quinault Reservation, *et al.*, argue (Br. 11-13) that Section 207's less-than-$100-in-five-years income test may result in the escheat of valuable interests in lands on which timber is harvested once every ten or more years, lands containing mineral interests on which mining has not yet commenced, etc. Such valuable interests would not, however, be escheated under Section 207. For example, if land is used for a timber harvest every ten years, it could presumably be shown that the land could be leased for a ten-year period—including one timber harvest—at a set annual amount. If that lease amount would result in income of more than $100 per year for a fractional interest in any one of the five years after the decedent's death, the fractional interest would not escheat.



respondents have no greater investment-backed expectations than did the plaintiffs in *Hodel* v. *Irving*. The Court's conclusion in *Hodel* v. *Irving* that that factor supported the constitutionality of the unamended Section 207 therefore is equally applicable here. Respondents accept that conclusion as well. See Resp. Br. 15 n.6.

Respondents do take issue with our analysis of the third *Penn Central* factor—the character of the governmental action. We point out in our opening brief (Gov't Br. 34-39) that this Court has frequently adverted to the broad authority of the sovereign to regulate the laws of inheritance, and that recognition of that broad authority is highly relevant in evaluating the character of the governmental action at issue here. Respondents reply that each of the cases we cite is distinguishable on its facts and that none of them establishes "that the sovereign has a right to * * * abolish descent and distribution." Resp. Br. 8.

Our argument is not that the sovereign has an absolute right generally to abolish *all* descent and devise of private property. *Hodel* v. *Irving* itself would seem to establish that to do so would violate the Constitution if just compensation were not paid to the

owners. But in analyzing the character of the governmental action, it surely is significant that regulation of the descent and devise of property is an area in which the sovereign's authority has always been recognized as very broad. Indeed, the Court in *Hodel* v. *Irving* itself "reaffirm[ed] the continuing vitality of the long line of cases recognizing [the sovereign's] * * * broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." 481 U.S. at 717. The cases "reaffirm[ed]" by the Court in *Hodel* v. *Irving* are the same as those upon which we rely here. Although they arose in distinct factual settings, the underlying principle on which they rest—that "[t]he right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions on it," *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1898)—is not in doubt.

3. Respondents argue (Resp. Br. 18) that, "[e]ven if the right of devise and descent can be limited in the abstract, the right cannot be taken without compensation if it was specifically provided for in negotiated agreements." Respondents argue (Resp. Br. 19) that the interests subject to escheat that are located on the Devil's Lake Reservation were originally patented under a treaty that, in their view, granted the patentee (and his heirs) a vested right of descent. They argue (Resp. Br. 19-20) that the interests subject to escheat that are located on the Standing Rock Reservation were similarly originally patented under an allotment act that similarly granted the patentee a vested right of descent. Finally, they argue (Resp. Br. 20-21) that the interests subject to



escheat that are located on the Fort Peck Reservation, although not allotted under a treaty or statute that specifically granted a right of descent, should be understood to have been subject to the same vested right to descent, derived from congressional committee reports on the Fort Peck Allotment Act, the General Allotment Act, or allotment acts involving other reservations.

Respondents' arguments are mistaken. Initially, nothing in any of the treaties or statutes cited by respondents gave any allottee the right respondents assert on behalf of their decedent in this case—to dispose of property by devise. To the contrary, those treaties and statutes provided that the allotted property would pass by descent at the death of the patentee. It was not until much later, in 1910, that Congress first generally provided for a right of devise. See Act of June 25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 373; see F. Cohen, *Handbook of Federal Indian Law* 220 (1942). And even the provision for descent of allotted property was stated in terms of what would occur on the death of the allottee; the cited provisions contain no statement regarding the rights of descent for those (like the decedent here) who succeeded to the property at a later date. Compare *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Nation*, 502 U.S. 251, 262-263 (1992) (contrasting effect of General Allotment Act on original allottees with its effect on subsequent Indian owners).

Moreover, the treaties and statutes cited by respondent could only reasonably be understood to provide that the property at issue would descend in accordance with the law of inheritance of the relevant sovereign (in this case, the United States) as in effect

at the time of a particular individual's death. For example, the pertinent portion of the treaty providing for allotment of the Devil's Lake lands provided that each patent "shall not authorize any transfer of said lands * * * except to the United States, but said lands * * * shall descend to the proper heirs of the persons obtaining a patent." Treaty with the Sioux-Sissiton and Warpeton Bands, Feb. 19, 1867, Art. 5, 15 Stat. 506 (1867). In so providing, the treaty does not specify a rule for determining who the "proper heirs" (if any) of the patentee would be, or what laws of descent would govern the disposition of the land at the death of the patentee or subsequent owners. In enacting the amended Section 207, Congress exercised its authority to determine that the "proper heirs" of a minor fractional interest are those who already own an interest in the same property—or, failing such a designation, the Tribe itself. This Court long ago held that Congress has plenary authority over the rules of descent governing Indian lands, and that federal law accordingly governs in this area. See, *e.g.*, *Jefferson* v. *Fink*, 247 U.S. 288 (1918); *Hodel* v. *Irving*, 481 U.S. at 712, 717 (reaffirming *Jefferson* v. *Fink*). Section 207 is thus entirely consistent with the treaty, and it does not operate to extinguish any "vested right" provided by treaty.

The same conclusion applies to the lands on the Standing Rock Reservation. Those lands were allotted pursuant to the Sioux Allotment Act of 1889, ch. 405, 25 Stat. 888. Section 11 of that Act provided "[t]hat the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto." 25 Stat. 891. That Act was not a contract under which Congress conferred on individual allottees (and those to whom the land passed in



future generations) a permanent and vested right to a particular set of inheritance rules.[3] Indeed, the Court rejected just that construction of a similar statute in *Jefferson* v. *Fink*, which involved Indian lands allotted under a statute specifically providing for their descent under the law of Arkansas. This Court held that the statute did not preclude Congress from later providing that the lands would descend in accordance with the law of the newly admitted State of Oklahoma instead. In so holding, the Court explained that "[w]hat was said [in the original allotment statute] was purely legislative, not contractual." 247 U.S. at 294. Therefore, "[l]ike other rules of descent," the rule provided for in the allotment act "was subject to change by the law-making power as to any land not already passed to the heir by the death of the owner." *Ibid.*

4. Respondents argue (Resp. Br. 11 & n.3) that the amendments to Section 207 have no effect on those who are minors or otherwise incompetent, and that Section 207 therefore is unconstitutional as applied to individuals in those groups. The decedent in this case, however, was neither a minor nor incompetent, and the will he executed was given full legal effect. Accordingly, this case does not present the question whether the amended Section 207 would be valid as applied to those who are minors or who are

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[3] See, e.g., *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 465-466 (1985) ("absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise") (internal quotation marks omitted).

incompetent, and there is no basis for the Court to offer an advisory opinion on that subject.

Respondents also argue (Resp. Br. 25-26) that to apply the amended Section 207 in this case would violate the Due Process Clause of the Fifth Amendment, because government officials assisted the decedent in drafting his will in 1981 (before the ILCA was enacted) and did not thereafter notify him that his will was no longer valid as to the parcels that would escheat under the Act. That claim was not passed upon by either court below and is not fairly included in the question presented. Accordingly, this Court should not address it in the first instance.

5. Amici Allottees Association and Affiliated Tribes and Bands of the Quinault Reservation, *et al.*, point out (Br. 23-25) that *inter vivos* disposition of minor fractional interests requires the permission of the Secretary of the Interior. In their view, such permission would be unlikely to be granted. They argue that, because in their new *inter vivos* transfers are likely to be impossible, Section 207's restrictions on devise and descent of minor fractional interests represent a particularly serious intrusion on the value of those interests. Amici's premise—that the Secretary does not or would not approve gifts (perhaps with reservation of a life estate) or other *inter vivos* transfers of minor fractional interests—is mistaken.

First, amici allege (Amici Br. 23) that the Secretary would not approve *inter vivos* transfers because Section 207 "expresses Congressional disfavor of transactions that fail to consolidate fractionated interests." All parties concerned—including Congress, the Secretary of the Interior, and amici themselves, see Amici Br. 3 (fractionation "has prevented the



effective use of land in divided ownership")—recognize that the extreme fractionation of Indian land interests is a serious problem. Section 207 represents a congressional judgment about one measure to be taken to address that problem. Section 207, however, is not reasonably read as a command to the Secretary of the Interior to do everything conceivable to avoid the problem, including disapproving reasonable *inter vivos* transfers. To the contrary, the Bureau of Indian Affairs has instructed its employees that "[a]n individual might not want his/her trust * * * property to escheat to the tribe" under Section 207; that "[e]scheat is the avenue of last resort, and attempts may be made to avoid escheat through beneficial use of a will or *inter vivos* transfers"; and that "[b]ecause ILCA does not restrict *inter vivos* conveyances, a person can transfer small interests to anyone during his/her lifetime." Department of the Interior, Bureau of Indian Affairs, 54 BIAM Supp. 8, "Estates Planning and Administration Guidelines," Illustration 1, at 32 (July 7, 1992).[4] In any event, even if the Secretary were to conclude that he should not approve an *inter vivos* transfer of a minor interest that would result in increased fractionation, it would not follow that he would disapprove a transfer of such

[4] See also 54 BIAM Supp. 8, Illustration 1, at 28 (instructing BIA employees that "you will be benefitting both the testator and devisees to the extent that you can consolidate interests in property through inter vivos transfers and through the will-drafting process"). We have lodged a copy of the Guidelines with the Clerk of the Court.

an interest to a single recipient in order to enable the owner to realize its full economic value.[5]

Second, amici contend (Br. 24) that the Secretary would disapprove *inter vivos* transfers because "the Secretary has a substantial incentive not to facilitate or approve *inter vivos* transfers which prevent escheat" and thereby increase the administrative burden on the Bureau of Indian Affairs. See also Amici Br. 10. With respect to the lands at issue, however, the Secretary acts as trustee and the individual Indians are the beneficial owners. *Tooahnippah* v. *Hickel*, 397 U.S. 598, 609 (1970). The Secretary as trustee must act in the best interests of the beneficial owners, and he therefore could not disapprove an *inter vivos* transfer in order to save administrative costs for the government. See *id.* at 609 (purpose of requiring Secretarial approval of *inter vivos* dispositions of trust property is "to protect Indians from improvident acts or exploitation by others"). There is no basis for concluding that the Secretary will fail to abide by his trust obligations. Indeed, amici offer no evidence that the Secretary or those acting on his behalf have ever disapproved an *inter vivos* transfer so that the property interest at issue would escheat under Section 207.[6]

6. We argue in our opening brief (Gov't Br. 40-42) that, even if escheat under Section 207 is found to have resulted in a taking of property without just

[5] We are informed that the BIA has, for example, regularly approved deeds transferring title to allotted trust lands but retaining a life estate in the grantor.

[6] Amici properly acknowledge (Br. 24), moreover, that there is no impermissible conflict of interest in the management of trust lands. See *Nevada* v. *United States*, 463 U.S. 110, 128, 142 (1983).



compensation in this case, the Act would remain valid in cases in which the decedent left a will that (unlike the one here) attempted to further fractionate the decedent's minor ownership interests or in cases in which the decedent died intestate. Neither respondents nor their amici take issue with that conclusion. In cases in which operation of the amended Section 207 would simply prevent further fractionation of minor fractional interests, there is no basis for challenging its constitutionality. See *Hodel* v. *Irving*, 481 U.S. at 718 ("Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat."). In cases of intestate succession, it is as reasonable to assume that those who died intestate were relying on (or at least prepared to accept) the authority of Section 207 to pass their minor fractional interests to the Tribe as it is to assume that they intended some other disposition of those interests. Moreover, it is not unreasonable to require a person who wishes to prevent escheat to take the affirmative step of preparing a will that designates a particular devisee for the fractional interest. As applied in cases of intestate succession, then, Section 207 should be recognized as constitutional.

Section 207 has operated as intended for almost 12 years since it was amended and for more than nine years since this Court's decision in *Hodel* v. *Irving*. As we noted in the petition for certiorari (at 16), the Department of the Interior estimated at that time that between 9300 and 14,880 estates involving escheatable interests had been probated under the amended Act in the Ninth Circuit alone. That ongoing administration of Indian estates and lands

should not be disrupted by now declaring the amended Section 207 unconstitutional on its face.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

WALTER DELLINGER
*Acting Solicitor General*

OCTOBER 1996